

12 San Jose, California  
Thursday, June 13, 2024

14 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
RECORDING 11:36 - 12:16 = 40 MINUTES

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1 Thursday, June 13, 2024

11:36 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: Calling Case 24-1321, SVB Financial  
5 Group versus Federal Deposit Insurance Corporation as  
6 Receivers of Silicon Valley Bank, et al.

7 Counsel, if you would please state your appearances  
8 and, again, begin with Plaintiff and the move to Defendants.

9 MR. SACKS (via Zoom): Good morning again, your  
10 Honor. Robert Sacks and Diane McGimsey from Sullivan and  
11 Cromwell, for the Plaintiff.

12 MR. LAFFEY (via Zoom): And good morning, your  
13 Honor. It's Casey Laffey and Kurt Gwynne from Reed Smith  
14 for the FDIC in its capacity as Receiver for Silicon Valley  
15 Bank as well as its capacity as Receiver for Silicon Valley  
16 Bridge Bank.

17 I believe Mr. Gwynne is taking the lead today. I see  
18 he is -- oh, there he is. He's on, but you're muted. So,  
19 good morning, your Honor.

20 MS. LYNCH: And Emily Lynch, also for the FDICR's,  
21 your Honor.

22 THE COURT: All right. Good morning.

23 All right. So, we have not had any case management in  
24 this case yet. So, Mr. Sacks, do these cases just proceed  
25 parallel to each other? They're related, but I didn't

1 consolidate them. I think the issues are different.

2 What's your thinking on it?

3 MR. SACKS: My thought, your Honor, is that  
4 discovery, because there's overlapping discovery --

5 THE COURT: Um-hmm.

6 MR. SACKS: -- would be joint. If a witness is  
7 being deposed, it's all the same set of facts.

8 THE COURT: Okay.

9 MR. SACKS: I think we would do that in both  
10 cases. And depending upon how your Honor rules on the  
11 motions to dismiss in the different cases, whether further  
12 coordination -- whether further consolidation would be  
13 appropriate could be determined at that time.

14 As you're aware, if the claim against the FDIC  
15 Corporate an APA claim, that's a very narrow case and a  
16 particular standard of review. That standard of review is  
17 not applicable to the claim against the FDIC Receivers, both  
18 sets of Receivers, which are de novo review. And, so,  
19 regardless of whether they prevail on any or all of their  
20 motions to dismiss, there will be a case that will be a de  
21 novo factual review of the claim in this case. And whether  
22 that should be consolidated for trial with the FDICC I think  
23 is largely dependent upon how you rule on the motions to  
24 dismiss. But discovery is clearly -- deposition discovery  
25 particularly is clearly one in the same, yeah.

1           THE COURT: Okay. Mr. Laffey, Mr. Gwynne, do you  
2 agree with that?

3           MR. GWYNNE (via Zoom): Good morning, your Honor.  
4 Kurt Gwynne from Reed Smith. We do not agree with that --  
5 this case -- this case is vastly different from the case  
6 against FDIC Corporate, and I'd like to take a minute, your  
7 Honor, to explain and emphasize the differences between FDIC  
8 in its Corporate capacity and FDIC as Receiver and how  
9 that's relevant and why these cases are so different.

10          The -- the FDIC as Receiver and the FDIC Corporate or  
11 what we call FDICC are separate and distinct entities under  
12 the law.

13          THE COURT: Um-hmm.

14          MR. GWYNNE: The FDIC insures deposits. It  
15 examines and supervises insured depository institutions,  
16 protects consumers, and it administers what's called a  
17 Deposit Insurance Fund, something you may hear about later.

18          The FDIC as Receiver, on the other hand, steps into the  
19 shoes of failed insured depository institutions or what we  
20 call banks, steps into the shoes of the failed banks and  
21 acts as the receiver for them. By doing so, the FDIC as  
22 Receiver succeeds to all the failed bank's rights, title and  
23 interest to claims, causes of actions and defenses, and it  
24 also administers a claims process under Title 12, the way a  
25 Bankruptcy Court would do for a corporation or an LLC or a

1 partnership. Banks aren't eligible to file bankruptcy in --  
2 under Section 109 of the Bankruptcy Code.

3 Congress instead provided for the resolution and  
4 liquidation of banks under Title 12, and the FDIC as  
5 Receiver runs that claims process.

6 The FDIC as Receiver also succeeds to the liability of  
7 the failed bank for -- for the deposit claims that it has  
8 subject to its defenses and in right of setoff.

9 FDIC Corporate does not act as Receiver. It's not  
10 involved in the claims allowance process if the FDIC runs as  
11 Receiver.

12 And, so, what does all that mean for purposes of these  
13 two actions and why does it make them so different?

14 THE COURT: Um-hmm.

15 MR. Gwynne: The FDIC, since its appointment, the  
16 day the bank failed, it was appointed on March 10th of 2023  
17 as Receiver. From that -- the inception of that  
18 appointment, it has been, in addition to trying to, you  
19 know, gather assets and -- and sell the bank's assets that  
20 ultimately were sold to First Citizen's Bank, but the FDIC  
21 as Receiver has been investigating causes of action owned by  
22 the bank, including causes of action or defenses against the  
23 parent company, which is the Plaintiff in this case.

24 The FDIC in doing so has identified several very large  
25 defensive setoffs that are going to be -- you know, that

1 play a major part in this litigation and in discovery. And  
2 these defensive setoffs have to do with mismanagement of  
3 what we call the Hold to Maturity Securities Portfolio,  
4 mismanagement of what's called the AFS or Available for  
5 Securities Portfolio, including improperly removing hedges  
6 that protected against interest rate -- losses when interest  
7 rates rise.

8       The parent company caused the bank to remove those  
9 hedges which -- and did so because it improved profitability  
10 and management compensation, compensation of the D's and  
11 O's. In addition, there were payment of improper dividends  
12 when the bank was experiencing financial distress. In fact,  
13 there were management bonuses paid on the very day the bank  
14 failed.

15       In addition, the bank had been for years selling  
16 warrants below fair market value to the parent company. And  
17 then, lastly, there's also potential issues regarding tax  
18 refund claims based on the -- the returns of the bank, you  
19 know, the bank's characteristics.

20       So, all of those things, all four or five of those  
21 defensive offsets are only involved in this case. None of  
22 those issues are implicated in any way, shape or form in the  
23 litigation against FDIC Corporate.

24       So, here we have a 12-count complaint against two  
25 Receivers, FDICR-1, which is what the call the Receiver for

1 Silicon Valley Bank, and then FDICR-2, the Receiver for  
2 Silicon Valley Bridge Bank.

3 So, we have a 12-count complaint. We've got those five  
4 large setoff claims. The amount of the complaint is the  
5 same in both cases. That's one difference. I mean, sorry,  
6 that's one similarity. The FDIC Corporate, the Debtor's  
7 chasing the same \$1.93 billion that it's asserting against  
8 the FDIC R's. But the defensive setoff claims which are  
9 those defenses exceeding \$5 billion -- and, by the way,  
10 we're not seeking an affirmative recovery. We're just  
11 saying whatever the amount is, we've got a lot -- you know,  
12 we have \$5 billion to set off their \$1.93. That is only an  
13 issue in this case.

14 The reason -- and I won't get into the discovery now,  
15 the schedules, because I told your Honor I just wanted to  
16 explain why -- why the cases are different. But even the  
17 Plaintiff identified 16 legal issues, 21 topics of --  
18 general topics of discovery, and 55 individuals. Your Honor  
19 doesn't know this, but they identified 55 individuals in  
20 their initial disclosures of people with -- with, you know,  
21 relevant information regarding the case.

22 Well, the FDICR's, the Receivers, identified 15 legal  
23 issues, six additional discovery topics, and 57 different  
24 individuals. We identified a total of 61, 57 of which were  
25 different than the 55 that -- that they identified.

1       So, unlike the other case where they're saying, Oh, we  
2 may not need a lot of discovery, here we've got, you know,  
3 12 counts, 31 general legal issues, 27 general -- broad  
4 discovery topics. And already at the outset of the case,  
5 potentially 112 individuals with knowledge of relevant  
6 facts.

7       We also have because of our five defensive offsets,  
8 expert discovery anticipate on eight -- eight issues,  
9 Silicon Valley Bank Financial Group's financial condition,  
10 the bank management or mismanagement, the warrant valuation,  
11 bank director and officer comp, management of the HTM, the  
12 Hold to Maturity Securities Portfolio, management of the  
13 AFS, Available for Sale Securities Portfolio, and the  
14 removal of the hedges, improper payment of dividends, and  
15 damages flowing from all of those offsets. That's eight  
16 issues of which expert testimony will be required that are  
17 -- none of -- none of those issues are involved in the FDIC  
18 Corporate litigation.

19       So, the civil action that the Plaintiff filed against  
20 FDIC Corporate doesn't contain those complexities. This  
21 cause of action against the FDIC -- FDICR's is not a run-of-the-mill civil action. You know, the amounts at issue are  
23 staggering. The issues are complex. It involves the  
24 invocation of the systemic risk exception in a context in  
25 which it has never been evoked before. So, it also involves

1 matters of first impression. And of course, I think it's  
2 obvious that, you know, these are issues of national -- of  
3 national importance.

4 THE COURT: All right.

5 MR. GWINNE: So, from our perspective, whatever  
6 goes on in the other litigation with the separate distinct  
7 legal entity of FDIC Corporate shouldn't hamper or prejudice  
8 the full time to litigate this case appropriately.

9 THE COURT: All right.

10 MR. GWINNE: For those reasons, your Honor, the  
11 cases are very different. Thank you.

12 THE COURT: I appreciate that.

13 So, what effect and who are the parties to the  
14 bankruptcy case that's filed in New York?

15 MR. SACKS: So, your Honor, if I might, I hope --  
16 I didn't realize we were going to argue the case today,  
17 but --

18 THE COURT: We're not arguing the case. I'm just  
19 trying to get -- to understand the -- the scope of it.

20 MR. SACKS: No. So bankruptcy has been filed by  
21 our client. Our client is a Debtor. Silicon Valley Bank  
22 Financial Group is the Debtor. And, so, that's -- that's  
23 the Debtor in New York.

24 Whether all these offset claims -- there is a threshold  
25 issue that the Bankruptcy Court is going to decide as part

1 of whether it confirms the bankruptcy plan as to whether  
2 those setoff claims have been waived by the FDIC and/or  
3 whether they will be waived by the bankruptcy plan and/or  
4 whether they are required to be asserted in the Bankruptcy  
5 Court. That will be decided as part of a confirmation  
6 hearing that is scheduled for mid July. They may be in this  
7 case. They may not be in this case. Ultimately at the end  
8 of the day --

9                   THE COURT: So, that's -- that's the point I was  
10 getting at, Mr. Sacks. This case will be affected by the  
11 Bankruptcy Court's rulings.

12                  MR. SACKS: It will be, your Honor, and the effect  
13 may be that the case proceeds as Mr. Gwynne says it should,  
14 and the effect may be it proceeds as I say it should and Mr.  
15 Gwynne appeals a Bankruptcy Court order as he has made clear  
16 he would do if the Bankruptcy Court does what the Debtor has  
17 asked to be done in Bankruptcy Court.

18                  THE COURT: Okay.

19                  MR. SACKS: So, that is an impact on it. And,  
20 please, I -- I was not suggesting consolidation of the --

21                  THE COURT: No, I know you weren't.

22                  MR. SACKS: -- (Zoom glitch) today, but there are  
23 many witnesses who are going to be deposed. And the idea --  
24 on the same exact subject. So, Mr. Tetra (phonetic), he's  
25 an employee. He's been identified even by the FDICC. Mr.

1 Maraga -- or I'm probably mispronouncing his name. When  
2 these people are deposed, they shouldn't be deposed on the  
3 same subjects twice. That's all I was suggesting at the  
4 present time, with the rest to be determined later in the  
5 case when the case is more fully formed rather than the sort  
6 of rhetoric of Mr. Gwynne and me at this point in time.

7 THE COURT: Okay. Well, and that's what I  
8 understood you to day.

9 MR. SACKS: Okay.

10 THE COURT: So, I -- I want to make clear that for  
11 any witnesses who would have testimony to give at deposition  
12 common to the two cases, that there be a meet and confer and  
13 an understanding. Those witnesses will be deposed once, and  
14 then by leave of Court, if you need additional deposition  
15 time in the other case, that you ask for it and it be  
16 limited. But I don't want you to have two separate  
17 depositions covering the same topics. That should -- it  
18 should be in everyone's interest to do that.

19 MR. GWYNNE: And, your Honor, Kurt Gwynne for the  
20 record. I agree with, your Honor, yeah, we should all act,  
21 you know, rationally and appropriately, not to unnecessarily  
22 burden a witness. But the -- you know, the issues are  
23 markedly different, and --

24 THE COURT: Sure.

25 MR. GWYNNE: -- I think if the -- the question is

1 going to be whether the depositions are really on the same  
2 subject, and that's something counsel's going to -- going to  
3 have to coordinate with, and I would also mention that the  
4 holding -- the holding company, the Plaintiff in this case,  
5 its board of directors overlapped with the board of  
6 directors of the bank, Silicon Valley Bank. In fact, they  
7 were the same people. So, you know, they -- they may be  
8 involved in both cases but also may be involved in different  
9 issues. So, we'll have to --

10 THE COURT: All right.

11 MR. GWINNNE: -- work that out.

12 THE COURT: Well, there's a lot more to be done.

13 So, Mr. Sacks, you believe the Bankruptcy Court will  
14 make some important rulings this summer?

15 MR. SACKS: I do, your Honor, one way or another.

16 THE COURT: Okay. And, so, I --

17 MR. SACKS: There is a -- I should say, your  
18 Honor, there is a confirmation hearing that is scheduled for  
19 the second week of July I believe.

20 THE COURT: Oh, that's coming right up.

21 MR. SACKS: I -- second or third week of July. I  
22 -- I apologize.

23 MR. GWINNNE: Both.

24 MR. SACKS: Both. I mean, it's several weeks, but  
25 it -- but it will be in July. It's in July, your Honor.

1           THE COURT: Okay. So, your motion to dismiss is  
2 set for hearing on October 10. So, certainly, by that time  
3 you will have some information from the Bankruptcy Court?

4           MR. SACKS: Yes, your Honor. It's Mr. Gwynne's  
5 motion to dismiss, of course, but yes.

6           THE COURT: Yes. All right. So, I -- I'd like to  
7 set a trial date at this first case management conference,  
8 and I had two very different views about when this trial  
9 should take place, and I was -- and, so, I'm -- I'm trying  
10 to decide what the best course of action is, and it looked  
11 to me like the Defense position was the trial should be  
12 sometime in the maybe late summer of 2026. I didn't have a  
13 date. So, I'm guessing.

14           MR. GWYNNE: Well, your Honor, yeah, we -- we  
15 didn't know what your Honor's calendar was, but we --

16           THE COURT: I understand.

17           MR. GWYNNE: -- had anticipated -- we had  
18 anticipated -- we -- we figured we'd leave it to the Court,  
19 but we did anticipate late summer or, you know --

20           THE COURT: All right.

21           MR. GWYNNE: -- fall potentially or the winter,  
22 depending on your Honor's schedule.

23           THE COURT: Thank you. As you heard in the other  
24 case, when I look at my calendar, I have to look at actual  
25 dates because you're competing with hundreds of other cases.

1 So --

2 MR. SACKS: Your Honor, can I just be heard on one  
3 -- one thing related to that?

4 THE COURT: Sure.

5 MR. SACKS: And -- and it's part of the reason for  
6 the difference in the importance of this, and we think this  
7 case should go to trial in 2025, which is a year and a half  
8 from now at this point. And we've tried many very  
9 complicated cases with shorter cases than that.

10 The FDIC's position is we are not entitled to recover  
11 interest in this case. And, so -- statutorily, that there  
12 is no right to interest here. And we --

13 THE COURT: Makes a big difference when you're  
14 into the billions.

15 MR. SACKS: And -- and, so, it's \$10 million a  
16 month, your Honor, that they -- that we are losing. So,  
17 we've already lost \$150 million in this -- by this if we're  
18 right. And we will lose \$10 million a month as each month  
19 goes on if they are correct in their position. Now, we've  
20 asked for restoration of our deposits as they were with what  
21 should have been earned on them in the interim, but they say  
22 that's just interest and we're not entitled to it, which is  
23 why we believe that the -- that the equities favor a  
24 relatively -- we're not asking for an expedited trial date.  
25 We're asking for a reasonable trial date, not a leisurely

1 trial date. And if they want to persist with the idea that  
2 we lose \$10 million a month by virtue of -- of doing  
3 nothing, then we should have a relatively timely trial date  
4 in this case.

5 THE COURT: Well --

6 MR. GWINNE: Your Honor, may --

7 THE COURT: -- I agree with --

8 MR. GWINNE: -- I respond?

9 THE COURT: Yes, you should have a reasonable  
10 trial date. There's a lot of work to get done.

11 MR. GWINNE: Your Honor, with --

12 MR. SACKS: Your Honor, I mean, we -- you know, we  
13 do -- I mean, so, if there are 20 depositions in this case  
14 or even 30 depositions in this case, the idea that those  
15 can't be done in six months or something like that, I mean,  
16 that's not a difficult chore for large law firms to handle  
17 in the ordinary course with an ordinary trial schedule. I  
18 mean, to go to trial at some point 18 months from now is  
19 really not an expedited trial, even for the largest of  
20 cases, your Honor.

21 THE COURT: So --

22 MR. GWINNE: No.

23 THE COURT: You know, my -- my case calendar is  
24 not as impacted as it used to be. I used to set cases out  
25 three years from the case management conference because

1 there were so many cases. And I'm pleased to say that I've  
2 reduced that by a lot. So I actually can't get this case to  
3 trial in the fall of 2025.

4                   Mr. Gwynne, did you want to make some comments?

5                   MR. GWYNNE: I -- I did, your Honor. And the --  
6 the Plaintiff in this case is always pushing to rush the  
7 schedule when it's not acting -- well, two things I would  
8 note. One is the Plaintiff filed it's claim in the FDIC  
9 receivership on the very last day for the claim. And that's  
10 important because the F -- FDIC as Receiver has 180 days to  
11 allow or disallow it. So, they could have taken three  
12 months off the -- the time period they're so worried about  
13 by filing their claim early.

14                  And then, after their claim was disallowed, they filed  
15 this litigation in front of your Honor on the very last day  
16 they could have. So, they don't mind taking the time and  
17 having delay when they're thinking about things or when  
18 they're working on things. They just want the Government  
19 and, you know, the FDIC and your Honor to -- to move at  
20 their speed when they're ready.

21                  But with respect to the reason they have a shorter  
22 schedule than us, there's one important reason for that,  
23 your Honor. They took discovery starting over a year ago in  
24 the Bankruptcy Court. The FDIC as Receivers produced over  
25 500 documents to the Plaintiff. In addition, we -- with our

1 consent, in good faith, we agreed to let First Citizens  
2 Bank, the ultimate purchaser of the Silicon Valley Bank  
3 operations, to produce thousands -- I think hundreds of  
4 thousands of documents to the Plaintiff. So, the Plaintiffs  
5 had plenty of documents. We haven't -- we haven't taken  
6 discovery in the Bankruptcy Court because it's always been  
7 our view that this Court, your Honor's Court, would be the  
8 appropriate venue and jurisdiction. That Section  
9 1821(d)(6)(A) of Title 12, as the Ninth Circuit said in the  
10 MTB case, that's not just a venue provision. It's  
11 jurisdictional. It's subject matter jurisdiction.

12 So, we didn't think we could ever create jurisdiction  
13 in the Bankruptcy Court by content because it's subject  
14 matter jurisdiction, but the Debtor has repeatedly tried to  
15 argue that we've done that. They keep trying to say we've  
16 invoked the Bankruptcy Court process.

17 So, we took no discovery in the Bankruptcy Court. So,  
18 they're way ahead of us. We waited for the appropriate  
19 court. We repeatedly said in the Bankruptcy Court when they  
20 tried to litigate these issues that it doesn't belong there  
21 because the Ninth Circuit case law is clear on that, that  
22 you got to proceed through the -- the receivership claims  
23 until that one's processed, and then you end up in one of  
24 two courts, either District of Columbia where your Honor's  
25 court, not the Southern District of New York and not the

1 Bankruptcy Court.

2       But they took discovery because they weren't worried  
3 about the argument of -- of, you know, being sucked into the  
4 Bankruptcy Court process. That's what they want. And, in  
5 addition, your Honor, they tried to use the privilege as a  
6 sword to stop us from looking at documents on our own  
7 servers that were maintained by Silicon Valley Bank  
8 employees, and that's one of the issues we have that --

9           THE COURT: Yeah.

10          MR. GWYNNE: -- is very important because it  
11 relates to a potential conflict of Sullivan and Cromwell  
12 that we think is critical that needs to be resolved at the  
13 outset of the litigation because, your Honor, as I  
14 mentioned, your Honor, the board of directors, it's the same  
15 people, right, the same people. And Sullivan and Cromwell  
16 was at all of the board meetings. Board meetings are joint,  
17 and they're joint every time they -- they were scheduled as  
18 joint meetings but, you know, they're joint, of course,  
19 because you got same people wearing different hats.

20          Sullivan and Cromwell was at every one of those board  
21 meetings. So, we believe they have confidential information  
22 of Silicon Valley Bank, including on the issues that relate  
23 to our affirmative defenses. It concerns us that we would  
24 go forward in discovery now that they've field this  
25 litigation and -- and we're -- you know, obviously we'll at

1 some point on at least count one, right, we'll file  
2 affirmative defenses and for, in essence, what was our own  
3 law firm, Silicon Valley Bank's law firm, to be  
4 participating in discovery against Silicon Valley Bank is  
5 subject --

6 THE COURT: If you're suggesting you're going to  
7 be bringing a motion to disqualify Sullivan and Cromwell,  
8 you better be doing that pretty quick.

9 MR. GWYNNE: Well, yes, your Honor. What we would  
10 like to do is the 200,000 documents I mentioned --

11 THE COURT: Yes.

12 MR. GWYNNE: -- that are on our server, they're  
13 claiming a privilege -- a Silicon Valley Bank Financial  
14 Group only privilege. We believe that those documents show  
15 joint representation of both Silicon Valley Bank and the  
16 Plaintiff. And, in fact, in -- even in the joint case  
17 management statement, the Plaintiff acknowledged that those  
18 documents could relate -- could relate, even solely relate  
19 to our affirmative defenses. They say that on page seven in  
20 the joint case management statement.

21 But yet they say we can't see them. We need your Honor  
22 to stay discovery generally except on the issues of conflict  
23 and -- and let's resolve the privilege issue.

24 THE COURT: So, you know, that's not -- I'm not  
25 going to do it that way. You do need to work out the

1 privilege issues. You do need to work out this  
2 disqualification issue. But the way we normally do it is  
3 you produce the discovery with the privilege log and then  
4 you litigate the privilege log. And this other way I think  
5 will stand in the way of producing a lot of documents.

6 Now, I'm going to -- this is important. I -- I  
7 certainly acknowledge that. If there is a disqualification  
8 motion, that -- those take a long time. Those are  
9 complicated motions, but the one thing that works against  
10 you is time because the longer this case goes on, the less  
11 likely it is that I will grant it.

12 I will be referring all discovery disputes to the  
13 Magistrate Judge assigned to the case. But on this issue, I  
14 don't have a motion before me to stay discovery pending the  
15 privilege dispute. So, I'm not ruling on it. I'm just  
16 telling you that's not the way we normally do things. If  
17 you want to bring that motion, of course, I'll consider it.  
18 If you want to go ahead with the discovery and bring a  
19 discovery dispute to the Magistrate Judge, that works as  
20 well. So, I think that's the best we can do there.

21 On the -- still thinking about the overall schedule,  
22 Mr. Gwynne, you've asked for a sizeable increase in the  
23 scope of discovery and the number of depositions than the  
24 Federal Rules allow.

25 MR. GWYNNE: Yes, your Honor.

1           THE COURT: I'm not saying that's wrong, but the  
2 way I handle that is you have to give me a discovery plan.  
3 You have to show why the 10-deposition-limit is not enough  
4 and who the other deponents would reasonably be and why  
5 they're so important to the case. So, I'd need to know the  
6 top 10. And if your top 10 are really your bottom 10, it  
7 will be really clear to me. So, I really need you to stack  
8 this list of my most important person to my least so that  
9 when I -- and it probably will, again, be the Magistrate  
10 Judge, but when we limit, if we do, the number of  
11 depositions you can take, you've already given us the order  
12 in which you need them. And that's something you need to do  
13 some work on it. I'm not -- I'm not expanding discovery at  
14 this point. We don't need to at this point, and I think  
15 much of this can be resolved through meet and confer.

16           And, so, there may be that there are 15 depositions  
17 that everyone agrees on and you're asking for a smaller  
18 number of additional ones. I want you to do all of that  
19 work before it comes to us. It's -- I don't know your case  
20 well enough to make an intelligent decision. You also need  
21 a lot more work on this until you can do the same. So, I'll  
22 put that back in your hands.

23           I -- I gather you don't have a protective order yet, is  
24 that correct?

25           MR. GWINNE: Correct. We do not have a protective

1 order.

2 THE COURT: Has anyone submitted a draft to the  
3 other side?

4 MR. GWINNE: No, your Honor. Like the FDIC  
5 Corporate, we thought we were getting one from Sullivan. We  
6 have not yet --

7 THE COURT: Well, when is the first --

8 MR. GWINNE: -- received one, but --

9 THE COURT: -- due? Who's going to do the first  
10 draft?

11 MR. GWINNE: What I think might make sense, having  
12 heard the other conference, your Honor, is for when -- when  
13 the Plaintiff makes comments to that order, sends a copy to  
14 us, we'll pick it up at that point, and because ideally, if  
15 we have very similar ones, it would -- it would probably  
16 work better for your Honor if we had the disputes --

17 THE COURT: Okay.

18 MR. GWINNE: -- in both cases.

19 THE COURT: Mr. Sacks, do you agree with that on a  
20 protective order?

21 MR. SACKS: That's fine, your Honor.

22 THE COURT: Okay. So, I want you to finish a  
23 protective order within two weeks of today, and any disputes  
24 that remain will go to the Magistrate Judge, but I want --  
25 you can't do anything until you have a protective order.

1 I'm not going to stay discovery pending a privilege dispute,  
2 but I understand discovery can't be turned over without a  
3 privilege order. So, that needs to happen.

4 In terms of my best estimate on the proper time for  
5 trial, and I've -- you know, listening to what you've said  
6 is -- is really very informative to me. At this point, I'm  
7 going to set your trial on March 23 of 2026. I think that  
8 roughly splits the -- the time difference that you have. It  
9 works into my schedule. I have no idea how long this trial  
10 will be. I'm not -- I ultimately give you a limit on trial  
11 days. I'm not asking for that now if we don't know what the  
12 scope will be. I'm going to set your final pretrial  
13 conference on February 12 of 2026 at 1:30 in the afternoon,  
14 and there are a couple of things I want.

15 First of all, I require that you review and comply with  
16 my standing orders. There were some things here that  
17 concerned me in FDIC's position regarding briefing. I -- I  
18 have a very specific rule on Daubert motions. And this is  
19 going to cause you to start planning for it.

20 So, there are a few things you need to be aware of. If  
21 you want to challenge at summary judgment an expert relied  
22 upon by your opponent, that objection which may be under  
23 Daubert, must be contained in the body of your motion or  
24 opposition and within the page limits provided to you.  
25 That's in our Local Rules.

1       If you want -- if you file a stand-alone Daubert motion  
2 along with a summary judgment, I will not consider that for  
3 the summary judgment motion because all objections must be  
4 contained within the body of the motion or opposition. But  
5 I have another rule that's going to be very important here.  
6 I require that all Daubert motions be heard at least 60 days  
7 before trial, but I don't reserve that date for you. So,  
8 I'll reserve that date 14 -- up to 14 days before you file  
9 the motion. That means you're filing the Daubert motion  
10 about eight months before trial. And if you're a little  
11 late on that and you call for a hearing date and my clerk  
12 says nothing's available, it's too bad. So, I'm telling you  
13 that now, almost two years in advance of trial. That's the  
14 rule.

15       Now, I also have page limits, and they are inflexible,  
16 because Daubert motions are way overused. Maximum 25 pages  
17 per motion. Maximum 10 pages per expert. So, if you  
18 challenge one expert, you get 10 pages. If you challenge 10  
19 experts, you get 25 pages.

20       Now, I do have a failsafe for you on the Dauberts,  
21 which I hope you won't use in this case because this is  
22 going to be complicated, but I make it available in every  
23 case.

24       You're welcome to use some of your motions in limine  
25 heard at the final pretrial conference as Daubert motions.

1 You're limited to five pages per motion and only five  
2 motions in limine. So, if you still want to challenge eight  
3 experts, well, you're out of luck because you only get five  
4 motions.

5 If you want to challenge five experts in your motion --  
6 in your final pretrial conference, I reserve the right to  
7 continue the trial date so that I could adequately consider  
8 them. All those things are in play. I want to make it  
9 really clear that you yourselves no service by jamming me in  
10 making these important decisions. It might feel good in  
11 jamming your opponent, but presumably I'm the audience and  
12 not -- not your opponent. So, these things are really  
13 important, and I -- I just want to make sure you have a fair  
14 opportunity to have these issues heard and considered by me,  
15 and I think this schedule gives us ample time.

16 I -- I think we're going to know a lot more after the  
17 Bankruptcy Court makes rulings. Maybe the case stays the  
18 same. Maybe it gets smaller, but I want to just put these  
19 dates in play. So, I gave you the trial and final pretrial  
20 dates. I'm going to set the last day I'll hear summary  
21 judgment as October 2 of 2025. That's the hearing date, not  
22 the filing date. I do reserve that date for you. I only  
23 allow one summary judgment motion in the life of the case  
24 per side. And in this case, because it may be that there  
25 are cross-motions for summary judgment, if you're both

1 filing summary judgments, I require it to be briefed as  
2 cross-motions. That means four briefs and not six. So,  
3 there are essentially -- there's -- the lead motion is  
4 filed, and then there's the op/motion of the other party and  
5 then two reply briefs. So, it's too early for you to know  
6 what -- what grounds you might have for summary judgment,  
7 but -- but I'm going to leave it at that. We're going to  
8 know a lot more after I really get my hands around the  
9 issues in the motion to dismiss and that we can see further  
10 things.

11 So, that's as much as I think I can do today. Mr.  
12 Sacks, was there anything else you were hoping to accomplish  
13 this morning?

14 MR. SACKS: To accomplish, no, but I -- I have to  
15 comment on Mr. Gwynne's discourse on Sullivan and Cromwell's  
16 purported conflict, your Honor.

17 THE COURT: Oh.

18 MR. SACKS: If they bring that motion, I believe  
19 we may ask for sanctions. We've been litigating with them  
20 since March of last year on all of these issues. They've  
21 raised issues with us. We're a year and a half in -- a year  
22 plus into this case at this point on these very same issues.  
23 They've had the documents in full since March of last year.  
24 If they wanted to raise this issue, they've had ample  
25 opportunity in the Bankruptcy Court, in the adversary

1 proceeding in the Bankruptcy Court, in the removal of that  
2 proceeding to the District Court, in our filing of a proof  
3 of claim against them and/or in this case, prior to today.

4       It was not in their original draft of the case  
5 management conference statement even. It got thrown in at  
6 the end of that in a second draft of it. It's tactical. We  
7 believe it has no merit, and I just didn't want that to go  
8 un -- unresponded to, your Honor.

9                   THE COURT: All right. Well, we won't argue that  
10 today.

11                  MR. SACKS: Thank you.

12                  THE COURT: There's no motion pending. So, maybe  
13 there won't be.

14                  MR. GWYNNE: Your Honor, may I briefly respond on  
15 two points?

16                  THE COURT: Sure.

17                  MR. GWYNNE: First of all, with respect to the  
18 Bankruptcy Court, it's always been our view the Bankruptcy  
19 Court has no jurisdiction. We think that's clear under  
20 sections of Title 12 that I won't get into. We never filed  
21 a proof of claim in the Bankruptcy Court. That's important.  
22 They filed a proof of claim -- they meaning the Plaintiff  
23 filed a proof of claim in the receivership process. That's  
24 where the -- the jurisdiction lies. That's why we're before  
25 your Honor.

1       Mr. Sacks says that our -- in the joint case management  
2 statement that our asserted setoffs are hypothetical,  
3 unasserted, and, oh, yeah, basically premature, yet he's  
4 saying, Well, they're hypothetical and unasserted because  
5 the conflict relates to them. The conflict, however, is too  
6 old to be raised.

7       We didn't raise any of the -- you know, we have -- we  
8 didn't file an answer in the Bankruptcy Court or the  
9 District Court. What we did in the Southern District of New  
10 York was when they filed a complaint, we filed a motion to  
11 dismiss and a motion to withdraw the reference to the  
12 District Court. District Court granted that. You know, a  
13 couple of days before the motion to dismiss, just ended up  
14 issuing an order not going forward with that hearing because  
15 the Debtor -- the Debtor had said to the Court that, We're  
16 going to file -- we'll probably file in the Northern  
17 District of California or -- or the District of Columbia.  
18 We'll have to file somewhere. And once we do that, we may  
19 not -- you know, we may dismiss this case in the District  
20 Court or maybe we'll ask the Court in California if we can  
21 go forward here.

22       But the -- the issue -- the conflict issue comes up  
23 during the course of the investigation when we're  
24 determining what these setoffs are. Just because they filed  
25 a proof of claim doesn't mean right away that the FDIC as

1 Receiver knows, Oh, Sullivan and Cromwell, you know, you  
2 have a conflict that's a potentially disabling conflict,  
3 because I just want the Court to keep --

4 THE COURT: Mr. Gwynne, I'm just -- I'm not  
5 hearing -- I'm not hearing argument on the motion now. You  
6 know, I appreciate that. Thank you. If --

7 MR. GWYNNE: Understood. Thank you.

8 THE COURT: Yeah. All right. So, I -- I think we  
9 will need further case management, but I don't think it  
10 would be productive until after the motion to dismiss. Do  
11 you -- is there any reason to do it sooner?

12 MR. SACKS: No, your Honor. I agree.

13 THE COURT: Okay. Mr. Gwynne, you agree with  
14 that?

15 MR. GWYNNE: Yes, your Honor.

16 THE COURT: Okay. So, when I see you in October,  
17 we can talk about where we are in the schedule. It won't be  
18 case management that day. But then you can just let me know  
19 when I can set it for further case management.

20 MR. SACKS: Very well.

21 MR. GWYNNE: All right.

22 THE COURT: Well, I think that takes care of  
23 everything. So, I -- as I mentioned, I'm referring the  
24 discovery disputes to the Magistrate Judge. That will keep  
25 the Magistrate Judge busy.

1       So, I do need you to work out the remainder of the case  
2 schedule consistent with the trial date, and that's going to  
3 be the close of fact discovery and the expert disclosure and  
4 -- date and the deadline for expert depositions and reports.  
5 So, if you could work on that and submit a stipulation and  
6 proposed order to me by -- we've got the 4th of July -- July  
7 12 -- I don't need that in any hurry -- that would be great.  
8 And if you disagree on those dates, you should expect that  
9 at least once I'll be sending it back to you to work on it.  
10 I don't like -- these are not things that should be disputed  
11 if I -- once I've given you a trial date. I know you don't  
12 agree on trial dates, and I'm glad to work that out, but the  
13 rest of this is just the ministerial deadlines, and I think  
14 you can take care of that.

15       All right. Thank you all. You've educated me well on  
16 this case, and I may not see you again until October, but I  
17 will be more informed at that point. So, thank you.

18           MR. Gwynne: Thank you, your Honor.

19           MR. SACKS: Thank you, your Honor.

20           THE COURT: All right. Thank you everyone.

21           THE CLERK: This court is adjourned.

22           (Proceedings adjourned at 12:16 p.m.)

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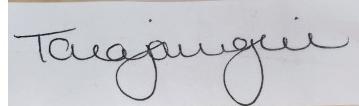
1                   CERTIFICATE OF TRANSCRIBER

2

3       I certify that the foregoing is a true and correct  
4 transcript, to the best of my ability, of the above pages of  
5 the official electronic sound recording provided to me by  
6 the U.S. District Court, Northern District of California, of  
7 the proceedings taken on the date and time previously stated  
8 in the above matter.

9       I further certify that I am neither counsel for,  
10 related to, nor employed by any of the parties to the action  
11 in which this hearing was taken; and, further, that I am not  
12 financially nor otherwise interested in the outcome of the  
13 action.

14

15                     
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17                   Echo Reporting, Inc., Transcriber

18                   Monday, June 17, 2024

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